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Supreme Court of the United States

October Term, 1957

No. 621

WELDON BRUCE DAYTON,
Petitioner

v.

JOHN FOSTER DULLES, individually and as Secretary of State of the United States,

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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The Government now concedes that the citizen's right to travel abroad—and thus to a passport requisite to such travel—is a fundamental right, subject only to restraints which accord with due process (*Kent and Briehl* v. *Dulles*, No. 481, Gov't Br. 26-27). Consequently, aside from the question of the Secretary of State's authority to deny passports at all on political grounds, absent which authority the denial here cannot stand (see Gov't. Br. 32): the principal issues remaining in this case are whether the Secretary's determination as to petitioner violates due process, unlawfully abridges his rights under the First Amendment, or contravenes the constitutional inhibitions against bills of attainder and ex post facto legislation.

As to the question of the Secretary's authority, we have adopted the views of petitioners in No. 481. As to our

argument that the Secretary's decision impairs petitioner's First Amendment rights and violates the principles implicit in the constitutional provisions prohibiting bills of attainder and ex post facto legislation (Pet. Br. 63-66), the Government's response (Gov't. Br. 105-106) needs no extensive reply. It is sufficient to note that whatever justification there may be for approving limitations on First Amendment rights in cases of Communist Party membership (see Gov't. Br., No. 481, pp. 97-100), petitioner here has never been a member of or even affiliated with that Party, and there is no finding to the contrary. The passport denial in this case was grounded solely on associations clearly within the ambit of the First Amendment guarantees, and was plainly designed to preclude petitioner from engaging in associations and activities likewise within the protection of that Amendment. The Secretary's action in this case is therefore clearly in violation of the First Amendment.

We shall hereafter consider in this reply brief solely the issues presented under the Due Process Clause.

The Government's argument that there has been no violation of petitioner's rights of due process rests on a conception by which those rights are so devitalized that they lose all significance as safeguards against governmental usurpation. In our view, the Government's brief not only lays bare the grave breaches of due process which have characterized this proceeding. By its many gratuitous glosses on the record, the brief affords a further example of the disregard for the fundamental principles of fairness which are the essence of due process.

1. ***The absence of any rational connection between the Secretary's findings and his conclusions.***

We have argued (Pet. Br. 52-60) that the undisclosed information on which the Secretary purported to rely and his findings, even if one were to assume their accuracy,

could still not afford a reasonable justification for the conclusions he reached; that is, that petitioner "is going abroad to engage in activities which will advance the Communist movement for the purpose knowingly and wilfully, of advancing that movement" and that issuance of a passport to him "would be contrary to the national interest (R.278). The Government offers two answers to this argument, neither of them tenable.

First, says the Government, "it must be assumed" that the body of completely undisclosed information referred to in paragraph V of the Secretary's decision (R. 278) "is sufficient to overcome whatever possible hiatus there may possibly be between the findings and information set forth in paragraphs I-IV [R. 276-277]", on the one hand, and his conclusions, on the other (Gov't. Br. 56). For, since the Secretary has said that this paragraph V "information may not be disclosed for reasons relating to foreign policy as opposed to internal security", the Government suggests that "it would not be unreasonable to assume that the undisclosed information relates more directly to the purpose of petitioner's proposed travel abroad to India—i.e., to the ultimate conclusion—than to the past events encompassed by the prior findings" (*ibid.*).

Second, even if the paragraph V undisclosed information is ignored, the Government argues that "it would . . . have been permissible for the Secretary to have concluded, on the basis of the evidentiary findings and related confidential information . . . [set forth in paragraph I-IV of his decision], considered in the light of the 'serious doubts' . . . as to petitioner's credibility raised by the testimony in the open record, that petitioner wished a passport in order to engage in the type of activities described in the Secretary's conclusion" (Gov't. Br. 57). This follows, according to the Government, because it "is not unreasonable . . . to infer" that his past activities and associations "are not the wholly unrelated and innocent facts which petitioner contends they are, but instead are linked by the

argument that the Secretary's decision impairs petitioner's First Amendment rights and violates the principles implicit in the constitutional provisions prohibiting bills of attainder and ex post facto legislation (Pet. Br. 63-66), the Government's response (Gov't. Br. 105-106) needs no extensive reply. It is sufficient to note that whatever justification there may be for approving limitations on First Amendment rights in cases of Communist Party membership (see Gov't. Br., No. 481, pp. 97-100), petitioner here has never been a member of or even affiliated with that Party, and there is no finding to the contrary. The passport denial in this case was grounded solely on associations clearly within the ambit of the First Amendment guarantees, and was plainly designed to preclude petitioner from engaging in associations and activities likewise within the protection of that Amendment. The Secretary's action in this case is therefore clearly in violation of the First Amendment.

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common thread of petitioner's close connection with the Communist movement" (*id.* 58); and because petitioner's repeated staunch denial that he ever was present at the New York City apartment building referred to in paragraph III (R. 277) in the face of the contrary testimony in that regard raised "serious doubts" as to his general credibility, sufficient to cast doubt on his "protestations of innocence with regard to his other activities and associations; to strengthen the adverse conclusions inferable from the composite of those activities and associations; and to support an inference that, if petitioner would falsify his testimony in this important matter during the consideration of his passport application, he would use the passport in furtherance of Communist activities" (*id.* 59-60).

The first answer which the Government advances is startling in its audacity. If the Government may fill all lacunae in the Secretary's decision from this bottomless well of nebulous information referred to in paragraph V of the decision,[1] it has succeeded in inventing a most convenient technique for resolving practically all substantive due process problems. Apparent illogic in governmental action may thus alchemically be converted to reason by the simple expedient of resort to a body of secret information which the Government may plead it cannot reveal for reasons of state. Such legerdemain would obviously drain the Due Process Clause of much, if not all, of its vitality.

Moreover, it is plain that the Government is here engaging in the sheerest surmise. As we have noted, the Secretary has furnished not the slightest indication of what the paragraph V information may concern. The suggestion that it relates to the purpose of petitioner's travel

[1] It is undisputed that the Secretary has not afforded even the slightest glimmer of what this paragraph V information may be or to what it may relate (see Gov't. Br. 76, fn. 40).

comes for the first time in the Government's brief in this Court. Thus, at this late stage, the Government would seek arbitrarily to amend the agency decision under review.

If the paragraph V information is related to the purpose of petitioner's travel, why did the Secretary himself not say so? To have stated as much and no more could certainly have breached no confidence. If this formula is to be proffered as the cure-all for each of the deficiencies in the Secretary's decision, surely the Court and petitioner were entitled to have had it come from the Secretary himself, not from his counsel. It is the Secretary's decision as he rendered it which is in issue here, not his lawyers' belated gloss on it.[2]

The Government's second answer, which, without regard to the paragraph V information, seeks to establish a rational nexus between the findings and recitals embodied in paragraphs I-IV of the decision and the Secretary's conclusions, likewise rests on mere conjecture and hypothesis. Whatever the Government's brief may suggest as to permissible inferences, the fact is, as we have pointed out in our main brief (pp. 53-59), that the Secretary himself never suggested, let alone found, that pet-

[2] That the Secretary's lawyers themselves do not really know any more than we what the paragraph V information relates to is apparent not only from their need to resort to supposition but also from the paradox to which, as they recognize, their assumption gives rise. For, "if the Secretary had information in the foreign relations area showing that petitioner's proposed travel was for the purposes stated", it would follow that "there was no need for the extensive consideration of petitioner's past" (Gov't Br. 56, fn 30). In an effort to extricate itself from this paradox of its own making, the Government again falls back on supposition: "it *would appear* that the information . . . *must have been* information which would be significant in relation to petitioner's travel only *if* there were reason to believe that petitioner had been engaged in Communist activity in the past" (*ibid.*, emphasis supplied). But, as is clear from the record (see *infra*, p. 6), the Secretary has never said that he believed that petitioner had ever been engaged in such activity.

tioner had any "close connection with the Communist movement" or that his activities or associations were any other than the "unrelated and innocent facts" which petitioner contended and testified they were (see Gov't. Br. 58). Nor is there an iota of evidence in the record which would support such a finding. Let us reiterate: (1) The Secretary has not found that he had reason to believe that petitioner ever knew that the Science for Victory Committee was organized by the Communist Party or for Communist propaganda, espionage, or other improper purposes; or that the three named persons associated with that Committee were members of the Party; or that petitioner or even the Committee ever engaged in Communist propaganda or espionage activities. (2) The Secretary has not found that he had reason to believe that Sarant's Communist or espionage activities (if such there were) were contemporaneous with petitioner's association with him; or that petitioner was in the least informed of such activities. (3) The Secretary has not found that he had reason to believe that petitioner's presence in the New York City apartment building (which he has steadfastly denied) was for any improper purpose, or in the company of or coincidental in time with the presence of Sarant and the Rosenberg group; or that petitioner knew or had reason to believe that the Sarant apartment was used for the unlawful activities alleged. (4) The Secretary has not found that he had reason to believe that petitioner has ever known of Dr. Bernard Peters' alleged Communist activities (if such there were).[3]

[3] The Secretary stated that confidential information "indicates" that Dr. Bernard Peters, with whom petitioner desired to work at the Tata Institute in India, "has held membership in the Communist Party outside of the United States; has engaged in numerous Communist activities both in this country and abroad; and is suspected of being a Communist espionage agent" (R. 277). In this connection, it may be worthy of note that we have just been informed that Dr. Peters has been invited to participate in experimental researches at the Institute of Theoretical Physics in Copenhagen, Denmark for the coming academic year.

In short, these characterizations of petitioner, his associations, and his activities, with which the Government's brief is so generous (see, e.g., pp. 28, 57, fn. 30, 58, 64), are supported neither by evidence of record nor by the Secretary's decision itself. Again, we submit that if the Secretary had reason to believe that petitioner's associations and activities were other than innocent, *the Secretary* should so have stated; it is *his* determination, not his lawyers' supposition of what that determination might have been, that is here in question.

The Government's brief makes much of the "serious doubts" as to petitioner's "general credibility" expressed by the Secretary (R. 278) because of the conflict between petitioner's testimony and that of the three custodial employees, with respect to petitioner's presence on "more than one occasion" in 1949 and 1950 in the New York City apartment building (Gov't. Br. 58-61). The emphasis in the Government's brief in this regard is far greater than was the Secretary's. It is significant that notwithstanding his professed doubts as to petitioner's "general credibility", the Secretary explicitly grounded three of his four findings on petitioner's "own statements" (paragraph I, R. 276; paragraph II, R. 276; paragraph IV, R. 277). Indeed, an examination of the record will demonstrate that petitioner's frank and comprehensive testimony is the *only* information which supports these three findings. Such reliance is hardly consonant with "serious doubts" as to petitioner's "general credibility."[4]

[4] We may pause to consider whether there was any justification for these professed doubts. Petitioner has repeatedly denied to the F.B.I., before two grand juries, and throughout this proceeding that he ever set foot in the apartment building in question (except on one occasion, in 1951, when he accompanied F.B.I. agents, at their request, to that address) (R. 32, 163, 193-134, 369-370). We believe that the contrary testimony of the three custodial employees (R. 171-267) is unreliable; and so apparently did the Federal law-enforcement officers, for none of these three was called as a witness before the grand juries which considered the matter (R. 181, 253, 265). Whether their testimony was cred-

There is every good reason why the Secretary himself never suggested that the paragraph V information relates to petitioner's purpose in travel abroad or that petitioner's associations and activities were any other than innocent. As to the purpose of petitioner's travel, the record is clear: except for the incidental pleasure of the voyage *en route*, petitioner wishes to go to India to accept an appointment at the Tata Institute to engage in cosmic ray physical research (R. 6, 12). He has unequivocally disavowed any other purpose (R. 12, 160). And, throughout the four exhausting years of petitioner's travail in the State Department and the courts, the Secretary has yet to specify any other purpose. The only reasonable conclusion is that the Secretary knows of none; that, consonant with his responsibility, he cannot specify such other purpose because neither confidential nor other information discloses any. As to the character of petitioner's associations and activities, the record is likewise plain: there is not a scintilla of evidence that petitioner himself ever engaged in any Communist or espionage activities or that he knew that the organizations and persons with whom he associated engaged in such conduct. Here, again, the Secretary, cognizant of his responsibility, has not found petitioner guilty of such conduct, because he knows of none, neither confidential nor other information disclosing any such conduct.

Consequently, the rationale of the Secretary's decision, unembroidered by the fanciful suppositions supplied by the Government's brief, is this and this alone: Finding

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ible or not, however, it is by no means unusual for such identification testimony to be mistaken. "Some of the most tragic miscarriages of justice have been due to testimonial errors in this field." Wigmore, *Science of Judicial Proof* (1937), p. 532; and see, also, Borchard, *Convicting the Innocent* (1931). In these circumstances and since the two grand juries, after hearing petitioner, were not sufficiently impressed to return an indictment against him, is it appropriate for the Secretary now to condemn him as a false witness?

that petitioner has in the past been chairman of an organization and associated with persons who (so confidential information indicates) were members of the Communist Party or engaged in Communist or espionage activities (the substance of paragraphs I-IV of the decision); the Secretary concludes that there is reason to believe that petitioner is now going abroad purposefully to engage in activities to advance the Communist movement. There is no finding of scienter or of petitioner's own involvement with the Party or with Communist or espionage activities.[5] In such circumstances, it is clear that the rational nexus which due process requires between the Secretary's findings and his conclusions is lacking. "The connection between the fact proved and that presumed is not sufficient. Reasoning does not lead from one to the other". *Manley* v. *Georgia*, 279 U.S. 1, 7; see, also, *Tot* v. *United States*, 319 U.S. 463.

2. *The Secretary's decision—a judgment of guilt by association.*

In light of the foregoing analysis, there can be little question, as we have argued in our main brief (pp. 61-62), that the Secretary's findings in this case assume relevance, if at all, only insofar as they reflect a judgment of petitioner's guilt by association. Conceding that such an official judgment of vicarious guilt is impermissible, the Government nevertheless cavalierly assures us that the Secretary "has not found petitioner 'guilty' of anything, in the proper meaning of that term [. . . that] in deciding passport applications, the Secretary does not sit as judge or jury to determine the truth or falsity of questions relating to past acts or past unlawful conduct" (Gov't. Br. 62-63).

This facile answer is but a frolic in semantics. As the Chief Justice remarked only the other day: "How simple

[5] The Government's suggestion that there is a "finding of scienter" in this case (Gov't. Br. 52) is not borne out by the record (see R. 276-278).

would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them!" *Trop* v. *Dulles*, No. 70, this Term, March 31, 1958, slip op. 8. The Secretary may not have used the term "guilty", but he has officially impugned petitioner's credibility and deprived him of precious liberties freely enjoyed by his fellow citizens. It avails petitioner nothing to be told that he has not been found nominally "guilty", but merely a person going abroad deliberately to engage in activities which will further the Communist movement. Moreover, how shall we reconcile the Government's glib disavowal of a verdict of guilt with its readiness to characterize petitioner as "a person who has been, and very likely will again become, if given the opportunity, deeply involved in Communist activity, possibly including espionage" (Gov't. Br. 64)?

Furthermore, there is not the slightest doubt that the Secretary's ruling—and now the Government's brief in its support—impose on petitioner that "badge of infamy" (*Wieman* v. *Updegraf*, 344 U.S. 183, 191; *Peters* v. *Hobby*, 349 U.S. 331, 347) which, as this Court has admonished, underlines "the need for procedural safeguards". *Cole* v. *Young*, 351 U.S. 536, 546.[6]

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[6] The Government's suggestion that the Secretary's determination "would not substantially add to petitioner's existing burdens" in this regard (Gov't. Br. 87, n. 45), since he has already been subjected to public obloquy, is an interesting exercise in fractionalization of Government responsibility. Apparently, since petitioner has already been harassed by the F.B.I. and other Federal Government officers (see R. 37, 39, 41), he may not be heard to complain of further harassment by the Secretary of State. The Government's suggestion recalls its argument in the court below (Br. for Appellee, No. 13717, C.A.D.C., p. 38) that the "badge of infamy" was of petitioner's own making, for, by remaining silent and not seeking judicial review, he might have worn the "badge" silently. Fortunately for the preservation of our liberties, there are always citizens among us who will speak out in vindication of their rights.

3. The vagueness of the grounds on which the Secretary's decision is based.

We have argued (Pet. Br. 46-51) that the passport denial here violates due process also because of the vagueness of the grounds on which it is based: (1) the Secretary's belief that petitioner "is going abroad to engage in activities which will advance the Communist movement for the purpose, wilfully and knowingly, of advancing that movement"; and (2) the Secretary's conclusion that "the issuance of a passport would be contrary to the national interest" (R. 278).

The Government's response to our argument is, first, that the words "Communist movement" cannot be deemed vague in light of the Congressional findings with respect to "the Communist movement" set forth in the Internal Security Act of 1950 (64 Stat. 987, 50 U.S.C. 781, *et seq.*), and the references to those findings by this Court in *Galvan* v. *Press*, 347 U.S. 522, 529, and *Carlson* v. *Landon*, 342 U.S. 524, 535. But this Court's approval of such Congressional findings as an adequate base for legislation cannot be equated with its acceptance of their validity as a standard for individual conduct, disregard of which results in loss of personal liberty. The issue in the one case is quite different from that in the other. In the former, the Court is concerned with the propriety of a congressional exercise of power; obviously no great precision is required in the findings by which Congress justifies the exercise of its power to legislate. Where, however, a congressional enactment or other governmental edict imposes a code of conduct which an individual is to heed at the peril of loss of liberty, due process requires that that edict be so precisely formulated as to afford fair notice to the individual of what he must do or may not do.

The congressional findings in terms of the "Communist movement" in the Internal Security Act are therefore of

no relevance to the issue which confronts us here. They were not designed to afford a guide to individual action. Indeed, the breadth of those findings is so vast that it is surprising to find the Government urging them as a standard for control of personal conduct. Significantly, the Act neither requires nor prohibits action by reference to the term "Communist movement."

Secondly, the Government argues that the meaning of the term "advance" with respect to the Communist movement is plain. But, for a demonstration of the vagueness of that term, one need but turn to the Government's brief (p. 50), where we are advised that "advance" means "to support, promote, aid, help, and render assistance to the Communist movement".[7]

The Government seeks to justify the "national interest" criterion relied on by the Secretary first, on the ground that it is but subsidiary and incidental to the "advancement of the Communist movement" standard. If so, however, it is subject to the same vice as the latter. Second, the Government refers to prior decisions of this Court which have sustained as valid, standards of "public interest" (see Gov't. Br. 51-52). But, the issue involved in the cited cases was the propriety of Congressional delegation to administrative bodies, not the validity of criteria controlling personal conduct. Considerations relevant in the one case are quite different, of course, from those in the other. The context of the terms of delegation within the entire framework of a statute and against the statute's purpose may be such as to make the standard meaningful

[7] The suggestion that the inherent vagueness of these terms is cured by the Secretary's conclusion that petitioner is going abroad "knowingly and wilfully" to advance the Communist movement is a specious one. According to the Government's argument, the voluntary and knowing purchase of a copy of "L'Humanité" at a Paris kiosk would constitute activity to advance the Communist movement.

to the administrators entrusted with execution of the legislative purpose. The very same terms, on the other hand, could well be meaningless to an individual whose conduct they were intended to control. In all of the cases cited in the Government's brief at pp. 51-52, it is notable that although the congressional delegation involved was couched in broad terms of "public interest", the specific orders directed to the individual citizens concerned were quite specific and precise.

In short, what the Government either fails or refuses to see is that we are here concerned with an administrative regulation which directly affects the mode of conduct of the individual citizen. Petitioner's fundamental right to travel has been abridged by his government because—so the Secretary says—there is reason to believe that he will engage in certain activities, which course of conduct bars him from exercise of that right. Petitioner would like to know just what he may do to have this bar lifted. The Secretary, however, persistently refuses to specify what are these activities in which he fears petitioner will engage. Were petitioner furnished with such a specification, he might conceivably be able to furnish assurance that he would not engage in the proscribed activities. Confronted, however, with the vague formulations, "advancement of the Communist movement" and "the national interest", petitioner can never know what he must do to satisfy the standard imposed for exercise of his right to travel abroad and thus he can never hope to vault the hurdle by which his Government restrains him. In consequence, his is a life imprisonment in his country for a cause of which he has never been informed.

4. *The Secretary's reliance on secret information.*

There is no dispute that the Secretary's determination in this case rests in vital part on undisclosed information. Indeed, as we have indicated (*supra*, p. 4-7), the Govern-

ment's brief ascribes even more significance to such secret information than did the Secretary himself.

a. The Government, however, insists, as we had anticipated it would (Pet. Br. 23), that petitioner was not "unduly prejudiced" by the use of such information (Gov't. Br. 65-68). Its argument comes to this—since petitioner was at all times aware of the past activities and associations with which he was charged; and "could best hope to refute" only the fact of such activities and associations; and, with but two exceptions, made no attempt to deny such activities and associations; and "was made aware of the general nature of the charges against the others with whom he was linked"; disclosure of the sources and details of information relating to the nature or character of his associates would have served no purpose and withholding them caused him no prejudice (Gov't. Br. 66-68).

This argument cannot withstand analysis. As we have pointed out (*supra*, p. 9-10), petitioner's past activities and associations, all of them innocent so far as the Secretary finds, assume relevance, if at all, only by reference to the allegedly culpable character of his associates. It is therefore the information bearing on these associates which lies at the very heart of this proceeding. All of this information is held secret. But, unless it is revealed, petitioner cannot hope ever to refute the charges against him. By the same token, absent disclosure, this Court can never intelligently review the Secretary's determination.

The summary afforded of "the general nature of the charges" (Gov't. Br. 68) furnishes no real aid. For, one cannot "be confident that a 'resumé is fair' when one cannot know what it is a resumé of . . . Language is treacherous and the meaning of what is written to no small degree derives from him who reads it". *United States* v. *Nugent*, 346 U.S. 1, 13 (Frankfurter, J., dissenting).

In our main brief, we have suggested advantages which petitioner might have derived from revealment of the information (Pet. Br. 23-24). Of course, we cannot know with certainty what use petitioner might have made of it. But clearly we are here concerned not merely with "an incidental infringement of technical rights". *Simmons* v. *United States*, 348 U.S. 397, 406. And, in that circumstance, as this Court has said, denial of the right to a fair hearing cannot be justified because the aggrieved person may have failed to "specify the precise manner in which he would have used this right—and how such use would have aided his cause." *Ibid.*

b. It would serve little purpose again to detail the conflicting interests of the citizen and the Government on this issue of disclosure. We are mindful that balancing these interests is not an easy matter; the decisions of this Court which have essayed the task attest to its difficulty. In advancing the Government's position, however, its brief seems to ignore the realities of the situation here and to misconstrue prior expressions of this Court.

The Secretary stated that disclosure of some of the information on which he relied "might prejudice the conduct of . . . foreign relations" (R. 278). But it cannot be gainsaid that by far the larger portion of the undisclosed information is not of that character. As the Government concedes, we "may assume that the bulk of the security information relied on by the Secretary . . . was . . . from F.B.I. reports" and the kind which has predominated in the Government's employee security and loyalty programs (Gov't. Br. 82). As to such information, the Government's interest in secrecy is primarily, if not solely, to avoid compromise of "investigative sources and methods" (R. 278.)

We have described the character of this kind of data in our main brief (pp. 36-37). And this Court has had occasion in recent years to appraise its worth. The evaluation

In Mr. Justice Frankfurter's dissent in *Jay* v. *Boyd*, 351 U.S. 345, 373, is unquestionably a fair one:

> ". . . We can take judicial notice of the fact that in conspicuous instances, not negligible in number, such 'confidential information' has turned out to be either baseless or false. There is no reason to believe that only these conspicuous instances illustrate the hazards inherent in taking action affecting the lives of fellow men on the basis of such information. The probabilities are to the contrary . . ."

We submit that the public interest is not served by keeping that kind of information secret at the expense of a citizen's liberties. "Indeed, it may well be that in the long run nothing but beneficial results will come from a lessening of . . . talebearing". *Parker* v. *Lester*, 227 F. 2d 708, 720 (C.A.9). A government intent on its duty to see that justice is done, that citizens' reputations are guarded against unfounded governmental accusation, and that their liberties are not unjustly impaired will, it seems to us, be serving the public interest better than one intent on maintaining a regiment of informers. Recent history supports this view. Cf., e.g., *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115; *Mesarosh* v. *United States*, 352 U.S. 1.

This Court's prior decisions which are cited in the Government's brief do not compel a contrary result. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, and *Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U.S. 103, insofar as they sanctioned the President's reliance on confidential information, did so only with respect to information directly germane to relations between our Government and foreign governments and utilized in formulating political decisions, not judgments affecting personal liberties. *Totten* v. *United States*, 92 U.S. 105, and *United States* v. *Reynolds*, 345 U.S. 1, were suits for money judgments against the United States, the sovereign's consent to which was narrowly construed to

preclude revealment of "state secrets". Though the nominal defendant in this action, the Secretary is truly the "mover" here; it is he who has deprived petitioner of a right guaranteed by the Constitution, and not petitioner who asks largess from his Government. *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, and *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, rest upon the duel doctrine that aliens have no rights and that the Executive has inherent power to control their movements. *Jay* v. *Boyd*, 351 U.S. 345, *Williams* v. *New York*, 337 U.S. 241, and *Escoe* v. *Zerbst*, 295 U.S. 490, were decided on the rationale that matters of grace, as opposed to right, were in question. The basic consideration which impelled the Court to permit withholding of the confidential reports in *United States* v. *Nugent*, 346 U.S. 1, was that the recommendation of the Department of Justice to which it was incidental was merely an advisory opinion, *Gonzales* v. *United States*, 348 U.S. 407, 412; the confidential reports were not even before the board which made the final determination in question. *United States* v. *Nugent*, *supra*, at 7, fn. 10.[8]

5. *The Government's reliance on other proceedings.*

In its summary of the facts, the Government makes reference, as it did in the court below, to evidence re-

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[8] *Liversidge* v. *Anderson* [1942] A.C. 206, and the other English decisions cited in the Government's brief (pp. 72, fn. 37, 79, 80) are inapplicable under a governmental system such as ours, one under a written constitution providing checks and balances, one of which checks against executive encroachment is an independent judiciary. See Douglas, J., dissenting in *Perez* v. *Brownell*, No. 44, this Term, Mar. 31, 1958. Moreover, as we have noted in our main brief (Pet. Br. 42, fn. 20), the *Liversidge* decision was handed down during the heat of war and when Great Britain was in mortal danger of invasion, circumstances quite different from those which confront our nation today. The English decisions have the virtue at least of making no pretense of conformance with a constitutional requirement of due process; they recognize an unfettered discretion in the executive.

ceived in other proceedings (Gov't. Br. 7-8, fn. 3,4; 11, fn. 5). By thus insinuating into this case records of proceedings to which petitioner was not a party and in which he was not even remotely involved, the Government seeks to lend color to findings of the Secretary otherwise quite meaningless so far as petitioner is concerned. Once again we are confronted with innovations introduced for the first time in the briefs of the Government; for the Secretary, so far as we know, himself never considered these other proceedings in reaching his determination. Whether or not he did so, however, the technique thus employed by the Government accentuates the disregard for due process in this case; it is the same pernicious practice which former Attorney General Brownell recently had occasion to impugn as characteristic of the system of "justice" in Soviet satellite states ("Satellite Justice on Trial", an address before National Conference on Citizenship, Sept. 19, 1953, p. 6):

> "Failure to assert the right to cross-examine has led to the most flagrant examples of proving guilt by association. In the trial of the Vatican Agents in Czechoslovakia in 1950, the judge announced that he was admitting in evidence the transcripts and files of ten other treason trials in order to complete the picture of the entire activity of the hierarchy and its ramifications. No defense lawyer jumped up to object to this method of establishing guilt".

We have a right to expect a higher standard of fairness from the officers of our own Government.

6. *The Government's view of due process.*

It is not surprising that the Government prefaces its argument with a lengthy exposition of what, in its view, is the nature of due process (Gov't. Br. 33-45). For only the Government's feeble image of that concept can justify the administrative procedures and decision in this case.

Let us understand what action this Court is asked to approve. It is asked to sanction the deprivation of a

citizen's fundamental constitutional right to travel on the basis of a government officer's conclusion that there was reason to believe that, in 1956, the citizen was going abroad to engage in activities purposefully to advance the Communist movement; a conclusion irrationally and *solely* inferred from the fact of his past associations, though in complete innocence, with one organization and certain persons who (we are told) confidential information indicates, had previously engaged in Communist or espionage activities. And this without permitting that information to be examined either by petitioner or by this Court. In short, this Court is asked to entrust the liberty and freedom of the citizen to the unbridled and unreviewable discretion of a government officer. Plainly such a result is irreconcilable with the principles of fair dealing which are the essence of constitutional due process.

The Government seeks to support such evisceration of the Due Process Clause, first, by reference to "the nature of the two powers [which, says the Government, were] here exercised in concert by the Congress and the Executive:—the defense and war power, and the foreign affairs power", contending that invocation of those powers permits limitations and procedures otherwise unacceptable (Gov't. Br. 35-36). But the restrictions of the Due Process Clause apply "with equal vigor" to the exercise of the war and foreign affairs powers as to any other power vested by the Constitution in the branches of our Government. See *Perez* v. *Brownell*, No. 44, this Term, Mar. 31, 1958, slip op. 13.[9] And, as the petitioners' brief

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[9] Moreover, as the court below itself recognized, "The issuance of a passport is not the conduct of foreign affairs" (R. 300). The Government has apparently accepted this view, for it now disclaims any inherent foreign affairs power in the Secretary to control foreign travel (Gov't. Br., No. 481, pp. 90-91, fn. 97).

The statement in the Government's brief (p. 74) that the issuance of a passport requires the affirmative conferral by the Secretary of his official sanction on the citizen traveller is not

in *Kent and Briehl* v. *Dulles*, No. 481, demonstrates, there is no concurrent exercise of power here by the Congress and the Executive; for the Congress has never authorized the Secretary to classify citizens on political grounds for purposes of travel control (see Pet. Br., No. 481, pp. 24-37).

The Government next argues that it was the purpose of Congress, when, in 1952, it enacted the statute codified as 8 U.S.C. 1185, to permit the Secretary to refuse to issue a passport and thus restrict travel on evidence available and satisfactory only to him and on his mere "reasonable suspicion"; and that, consequently, due process must be construed to accomodate that purpose (Gov't. Br. 36-45). By its terms, 8 U.S.C. 1185 contains no express grant of power to the Secretary to control travel; and for the reasons set forth in detail in petitioners' brief in No. 481, we do not believe it can be so construed. Even if it were so construed, however, the statute plainly grants no authority to the Secretary, whether expressly or by implication, to dispense with the traditional modes of proof and procedure embraced within the concept of due process. Nor does the Government find any such authority in the terms of the statute or even in its legislative history. What it seeks to do is to import such a radical grant of authority into the 1952 statute from the legislative history of a predecessor provision enacted in 1918 (Act of May 22, 1918, c.81, 40 Stat. 559).

So large and sweeping a grant of authority to the Executive as is claimed here is not ordinarily implied in the absence of an unequivocal Congressional declaration.

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true. There is no statutory requirement that a passport contain, as it now does, the Secretary's request to "all whom it may concern to permit safely and freely to pass, and in case of need to give all lawful aid and protection". A passport need merely attest to the citizenship of the bearer, and the Secretary is free to revise the form of the passport to eliminate any conferral of official sanction.

Interstate Commerce Commission v. *Cincinnati etc. R. Co.*, 167 U.S. 479; *Hannegan* v. *Esquire*, 327 U.S. 143. On the contrary, as this Court said, in *Ex parte Endo*, 323 U.S. 283, 300:

> "We must assume when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."

Moreover, there are other considerations which militate against the Government's contention that from the 1918 legislative history we must conclude that the Secretary is today empowered to control travel in his unlimited discretion and without regard to traditional due process.

First, the 1918 statute was enacted in the light of a precise existing situation, directed to a precise evil, and limited in duration to that precise evil. It was enacted during World War I for the precise purpose of preventing espionage and sabotage on behalf of the German government (see Gov't. Br., No. 481, pp. 45-48). By its terms, it expired on the termination of that war. Even if it could be construed to sanction dispensation with due process safeguards, such authority, since it contained a restriction on constitutional rights, would be restricted to the precise purpose for which it was enacted, that is, the protection of the war effort in World War I. Cf. *Ex parte Endo*, *supra*.[10]

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[10] As we have indicated (*supra*, pp. 6, 8), the Secretary has not found that it was necessary to prevent petitioner's travel to India in order to protect the nation against espionage or sabotage. Had that been the reason for the passport denial, it would have been posited not on section 51.135(c) of the Passport Regulations, as was the case here, but rather on section 51.136 of the Regulations, which provide for refusal of a passport "where it appears to the satisfaction of the Secretary . . . that the person's activities abroad would . . . violate the laws of the United States . . ." (see Pet. Br., Appendix, pp. 77-78).

Second, we are aware of no doctrine which permits a repeal of the Due Process Clause and the protections it affords by the mere expedient of the expression of purpose in the course of Congressional debate. If that was the purpose of the Congress in enacting the 1918 statute, the statute *pro tanto* was invalid.[11] Nothing would be served therefore by transporting such infirmity into the 1952 enactment.

Nor is there any warrant for imputing to the Congress which enacted the 1952 statute, an intention to approve such a construction of its 1918 predecessor (see Gov't. Br. 41). The 1918 provision and its immediate successor, the Act of June 21, 1941, 55 Stat. 252, show a history of enforcement only of the provisions relating to travel by aliens; there is no history of enforcement of their provisions relative to restraint on citizens (see Gov't. Br., No. 481, pp. 54-55, fn. 55). There is good reason for this lack of history. Citizens rarely exercised their right to travel abroad during World Wars I and II, and restraints on citizens' travel on political grounds were generally not imposed by the Secretary prior to 1950 (see Gov't. Br. No. 481, p. 64); consequently, there were no occasions for judicial consideration of the provisions in the 1918 and 1941 statutes affecting citizens. In view of the fact that such provisions were generally not invoked prior to 1950 and there had been little, if any, exercise of that power,

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[11] The officers in the State Department who were responsible for administering the 1918 enactment apparently did not construe the statute as radically as the Government does now. In the Passport Control instructions of December 16, 1920, printed in the Appendix to the Government's Brief in No. 481, pp. 125-126, appears the following caveat (at p. 126)

> "In every case [of passport refusal on political grounds], action upon reports, showing that a person comes within one of the classes noted, *should be based upon specific facts*. Each case should be adjusted upon *tangible and incontrovertible evidence* of revolutionary activity, *rather than on* suspicion." (Emphasis supplied).

there is no basis for inferring that Congress, when enacting the 1952 statute, was indicating approval of any prior executive conduct.

The Government, however, insists that to deny the Secretary authority to dispense with traditional due process safeguards "would nullify, as a practical matter, the concept of travel control as a distinct and legitimate power of Government designed to accomplish a limited goal" (Gov't. Br. 45). This is but a fanciful dilemma. If the Secretary is authorized to control travel abroad of citizens on political grounds—which we would deny—there is no reason we can conceive why such control cannot and should not be exercised in strict conformance with every requirement of due process. To do so may undoubtedly increase the difficulty of the Secretary's task, but, as contrasted with totalitarian governments, we have always been proud to forego expeditious short-cuts where they would impair the personal liberties of our citizenry. In any event, before resorting to such short-cuts, we have insisted at the least on a clear expression by the Congress that they are necessary and a legislative enactment unequivocally authorizing such departures from our traditional system of justice. These are absent here.

We are quite cognizant of Mr. Justice Holmes' reminder that "what is due process of law depends on circumstances . . . [and that it] varies with the subject-matter and the necessities of the situation". *Moyer* v. *Peabody*, 212 U. S. 78, 84. But, as the Chief Justice recently admonished: "The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our nation. They are the rules of government". *Trop* v. *Dulles*, *supra*, slip op. 17. "The requirement of 'due process' is not a fair-weather or timid assurance . . ." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 162 (Frankfurter, J., concurring). It may not be

tortured on a Procrustean bed to fit the convenience of each moment or to ease the task of government officers in the performance of their functions. Mr. Justice Frankfurter's remarks in the *Joint Anti-Fascist Committee* case, *supra,* 341 U.S. at 173-174, are peculiarly apt here:

> "We are not here dealing with the grant of Government largess. We have not before us the measured action of Congress, with the pause that is properly engendered when the validity of legislation is assailed. The Attorney General [or the Secretary in our case] is certainly not immune from the historic requirements of fairness merely because he acts, however conscientiously, in the name of security. . . . Due process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in assuring fundamental justice, it is also a living principle not confined to past instances".

Let us not indulge in pretense. What the Government is asking is that this Court sanction the destruction of a citizen's liberty at the hands of a governmental officer acting *in camera* and in his complete and unfettered discretion. We again recall the caveat of Mr. Justice Matthews in *Yick Wo* v. *Hopkins,* 118 U.S. 356, 370, perhaps more timely today than when it was first uttered: "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself".

Respectfully submitted

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